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NO. 90–808

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STANLEY PLESINSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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I

PETITIONER PLESINSKI IS ENTITLED TO RELIEF IF THE DISTRICT COURT ERRED IN DENYING HIS MOTION TO DISQUALIFY AN UNAUTHORIZED PROSECUTOR

The government argues that the petition should be denied because of the absence of a showing of prejudice due to the participation of Special Assistant United States Attorney Feldman, whose appointment is at issue in this case. The government's suggestion that the Court deny the petition on these grounds and not reach the merits is in violation of the agreed–upon resolution of

this case in the district court and Rule 11(a)(2) of the Federal Rules of Criminal Procedure. This suggestion was rejected by the Court of Appeals which ruled on the merits in this case.

Mr. Plesinski entered a plea of guilty pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. That rule provides as follows:

> **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

In this case the issue preserved for appeal was, *inter alia*, whether the district court erred in failing to disqualify Feldman from further participation in the case because of his lack of statutory and Constitutional authorization to represent the United States. Under Rule 11(a)(2), if the district court erred in failing to disqualify Feldman, petitioner is entitled to withdraw his plea of guilty.

As a factual matter, although Feldman alleged that he was acting under the "supervision" of a regular Assistant U. S. Attorney throughout the course of the case, the record shows that Feldman was the main attorney for the government with respect to the investigation, formulation of charges, and prosecution of this case. (ECR 73–75, RT II 45–57)[1] Feldman was the only attorney who worked throughout the case for the government, there being two regular Assistant U.S. Attorneys with whom he consulted in the prosecution of the case.

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[1] "RT" refers to the Reporter's Transcript of district court proceedings.

At the trial of the co-defendant Vinograd, Feldman conducted the case for the government. He made the opening statement, conducted the direct examination of all government witnesses and the cross-examination of all defense witnesses, made the closing argument, and apparently argued almost all,if not all, of the evidentiary issues that arose during trial of the case. In this case it was Feldman alone who represented the government at the time of the main motion hearing. Feldman also was the exclusive representative of the government at the critical sentencing hearing on 3 April 1989, (RT Vol. III) before which he had filed a sentencing memorandum seeking a ten year prison sentence. In short, Feldman was the main representative of the U. S. government in this federal criminal prosecution.[2]

Finally the government's argument, which emphasizes that Feldman was nominally under the direction of the United States Attorney, again fails to deal with the significant issue of whether the district court erred in failing to disqualify him from participation in the case and from representation of the government due to his Constitutionally and statutorily inadequate

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[2] The government asserts in its brief that the evidence, "the sufficiency of which is not under dispute here," shows that from at least 1985 until 1988 petitioner conspired to possess several thousand pounds of Mexican marijuana. (G.B. 2) In addition, the government alleges that in 1988 petitioner accepted delivery of approximately one thousand kilograms of marijuana from a confidential informant. (G.B. 2) The government statement is factually inaccurate. Petitioner pled guilty to count one only of a second superseding indictment which alleged a conspiracy involving events occurring in the years 1984 and 1985. Petitioner never pled guilty to any acts occurring in 1988.

appointment. It is not sufficient to argue that the prosecutor was subject to possible administrative oversight by higher officials. In light of the significant federal power wielded by Feldman himself, whom the Court of Appeals found to be an "inferior officer" under this Court's criteria in *Buckley v. Valeo*, 424 U.S. 1 (1976), *United States v. Nixon*, 418 U.S. 683, 694 (1974), and *Morrison v. Olson*, 487 U.S. 654 (1988), petitioner was entitled to the relief of disqualification upon a showing of the absence of proper authorization. *Cf. Young v. United States ex rel Vuitton Et Fils S.A.*, 481 U.S. 787 (1987) The participation of an unauthorized person, through whose actions petitioner was sentenced to nine years in prison, constitutes "prejudice," in any event.

II

THE APPOINTMENTS CLAUSE REQUIRES REVERSAL OF THE COURT OF APPEALS DECISION IN THIS CASE

The Appointments Clause of the Constitution, Article II, Section 2, Clause 2 provides as follows:

> (The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herinafter otherwise provided for, and which shall be established by law: but the Congress may by Law vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The brief in opposition fails to address adequately the central issue raised in the petition for a writ of certiorari: whether the Constitution requires that an "inferior officer" of the United States be appointed by the head of the department

and whether that power may be delegated to lesser officials consistent with the Appointments Clause. The government's brief raises more questions than it answers. The government concedes that certain powers must be exercised by the President only and may not be delegated:

> We do not suggest by the foregoing discussion that the President may delegate specific powers that are assigned to him directly by the Constitution itself, such as the power to approve or disapprove bills, grant pardons, serve as Commander–in–Chief, or even to nominate, and with the advise and consent of the Senate, to appoint officers covered by the first portion of the Appointments Clause. The text and structure of the Constitution have been understood to contemplate that these powers must be exercised by the President personally. *See* 7 Op. Att'y Gen. 453, 464–465 (1855); 50 Op. Off. Legal Counsel 91, 93–94 (1981)(G.B. 17)

The government argues that a statute passed by the Congress vesting the appointment authority for inferior officers in a subordinate officer below than the head of the department would be unconstitutional. (G.B. 18–19) The government agrees the assignment of responsibilities in an Executive department must be consistent with the Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) (G.B. 15) Nonetheless, after agreeing that the text of the Constitution requires that certain powers be exercised personally by the executive official designated in the text (the President), and agreeing that a statute delegating the power of appointment of inferior officers to a subordinate official below the head of the department would be unconstitutional, the government argues that the four level delegation of the power of appointment in this case, is nonetheless both statutorily authorized and Constitutionally permissible.

The government's analysis of the Appointments Clause is grossly inconsistent. When dealing with the first section of the Appointments Clause, which requires the nomination and appointment of officers of the United States by the President with the consent of the Senate, the government concedes that the Constitution requires that such an act must be done by the President and the President alone and that his power to appoint under the Appointments Clause may not be delegated. (G.B. 17) We suggest that the Appointments Clause must be read consistently throughout. Just as the first section of the Appointments Clause clearly requires that the nomination and appointment of "officers" be done only by the President, the second section, referring to the appointment of inferior officers, requires action by those limited classes of persons in whom the Constitution permits the Congress to vest the power of appointment, specifically the President alone, the courts of law, or the heads of departments. The government's position set forth in its brief in opposition argues a contradictory analysis of the Appointments Clause, unsupported by history or text: the power to appoint "officers" subject to Senate confirmation must be done by the President and is not delegable, but the appointment of "inferior officers," a power to be vested in the President alone, the courts of law, or the heads of departments, may be freely delegated and subdelegated without restriction. A statute passed by Congress reposing the appointment of inferior officers in officials below the head of department is unconstitutional; a regulation or administrative practice doing the same thing is permissible, according to the government, because it "preserves the ability of the Department Head to control the affairs of his Department." (G.B. 19)

The government's position becomes yet more puzzling and inconsistent when one extrapolates its argument to the other portions of the Appointments Clause dealing with the appointment of inferior officers of the United States. For example, although the second portion of the Appointments Clause provides that the Congress may vest the appointment of inferior officers in "the President alone," the government's reading of this portion of the Appointments Clause would presumably permit the President to delegate the appointment of inferior officers required by statute to be appointed by the President alone to lesser officials in the Executive Branch, despite the government's position that the power to appoint "officers" subject to Senate confirmation is not delegable by the President. Thus in order to reach its dubious conclusion the government has propounded the following position: the President when nominating and appointing "officers" of the United States, must act personally and may not delegate such powers. However with respect to the appointment of inferior officers, despite the language of the Clause that the Congress may vest the appointment of such officers "in the President alone" the President may presumably delegate such authority. (G.B. 17, n.1) Under this rationale, despite the holding in *Morrison v. Olson*, 487 U.S. 654 (1988), the government's reasoning would suggest that independent counsel whose appointments are vested in the "courts of law" may be properly appointed by a delegee of the courts. Presumably the government would permit the appointment upon a delegation by an appropriately designated law clerk, member of the bar, or committee.

The government fails to respond to the central thesis of petitioner's application, specifically that the Appointments Clause requires the appointment

of certain officials possessing significant federal authority personally by the named officials or entities, in order to insure structural integrity and political accountability. In dealing with the suggestion that inferior officers should be permitted to be appointed by officers below the heads of the department, the Constitutional Convention itself rejected Madison's motion in approving the Appointments Clause. The purpose of the Clause is to insure structural accountability by placing the appointment of officials exercising significant federal authority in specific, identifiable, and highly placed governmental officials. If the Congress could not constitutionally pass a statute vesting the power of appointment in officers below the heads of departments (as the government concedes) then petitioner respectfully submits that the administrative delegation of the appointment power by the head of the department followed by a sub–delegation and another sub–delegation to a fourth echelon employee cannot be Constitutionally permissible. Petitioner agrees with the government that the Executive has broad discretion to delegate the execution of the laws to subordinates. In this limited and highly specific area of appointments however, the Constitution mandates personal action by the President alone, the Courts of Law, or Heads of Departments. As the explicit language of the Appointments Clause and because the debates and votes of the Constitutional Convention make clear, the inferior officer in this case, Mr. Feldman, was not properly authorized to act on behalf of the United States because he was not appointed by the head of the department, the Attorney General. When the Constitution requires a specific act (appointment) be done by a particular official or entity (the President alone, the courts of law, or the heads of departments), then its clear command must be heeded. It means what it says.

The Court of Appeals decision in this case violates the holding of *Buckley* that ". . . any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must therefore be appointed in a manner prescribed by § 2, Clause 2 of that Article" 424 U.S. at 125–126. Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

28 FEBRUARY 1991

Respectfully submitted,

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